

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION

MOSES WHITE, JR.	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO. 2:07cv23-WKW
	)	
STATE OF ALABAMA, <i>et al.</i> ,	)	
	)	
Defendants.	)	

**ORDER AND RECOMMENDATION OF THE MAGISTRATE JUDGE**

Upon consideration of the plaintiff's motion for leave to proceed *in forma pauperis*,  
it is

ORDERED that the motion be and is hereby GRANTED.

The plaintiff's pro se complaint proceeds under 42 U.S.C. § 1983. The plaintiff names as defendants the State of Alabama, T. A. Fuentes, deceased Circuit Judge Joseph Phelps, Mary Lambert, Capt. Hankins, Jack Hunter, Bruce Howell, District Attorney Jon Turner, Bob Merrill and Lt. S. Williams. Upon review of the complaint, the court concludes that, for a number of reasons, dismissal of this case is proper under 28 U.S.C. § 1915(e)(2)(B).

Pursuant to 28 U.S.C. § 1915(e)(2)(B)(i), the court may dismiss a pro se case if it determines that the case is frivolous or malicious. A factual frivolousness finding is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible. *Denton v. Hernandez*, 504 U.S. 25 (1992); *Carroll v. Gross*, 984 F.2d 392, 393 (11<sup>th</sup> Cir.

1993). At any stage of the proceedings, a case is frivolous for the purpose of § 1915(d) when it appears the plaintiff “has little or no chance of success.” *Carroll*, 984 F.2d at 393. A district court may conclude a case has little or no chance of success and dismiss the complaint before service of process when it determines from the face of the complaint that the factual allegations are “clearly baseless” or that the legal theories are “indisputably meritless.” *Neitzke v. Williams*, 490 U.S. 319, 327 (1989); *Denton*, 504 U.S. at 32-33. Rather than interpret what the plaintiff states in his complaint, the court will quote it.

5. State the facts on which you base your allegation that your constitutional rights have been violated: child abuse/sex abuse I Clerk of the Circuit Court of Montgomery County. Inalienable rights. Due process of law. Probable cause, bias, jury tempr. (sic) hearsay evidence, warrantless search, failure to have legal counsel during interrogation. drop to sexual abuse II

Attached to his complaint are three pages which detail a “motion,” a “motion: violation of civil rights. writ of habeas corpus,” and “writ of habeas corpus.” However, the plaintiff is not incarcerated and seeks in his prayer for relief only to be reinstated in his job at the Montgomery Youth Detention Facility and to return to his position as a constable for Montgomery County and a licensed private investigator for Montgomery County.

This is a paradigm of a case that should be dismissed without prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(i). The plaintiff’s claims are barred by the statute of limitations. This lawsuit was filed on January 5, 2007. The plaintiff alleges that the deprivation of his constitutional rights occurred on June 15, 1993. In this Circuit, Alabama’s two-year personal injury statute of limitations is applicable to claims brought pursuant to 42 U.S.C. § 1983. *See*

*Owens v. Okure*, 488 U.S. 235 (1989); *see also Jones v. Preuit & Mauldin*, 876 F.2d 1480 (11<sup>th</sup> Cir. 1989); *Dukes v. Smitherman*, 32 F.3d 535 (11<sup>th</sup> Cir. 1994). In this circuit, claims barred by the statute of limitations may be dismissed under § 1915. *Clark v. State of Ga. Pardons & Paroles Bd.*, 915 F.2d 636 (11<sup>th</sup> Cir. 1990). The plaintiff's claims arose more than two years before the date he filed this complaint, and thus, his claims are barred by the statute of limitations.<sup>1</sup>

### CONCLUSION

Accordingly, it is the RECOMMENDATION of the Magistrate Judge that this case be DISMISSED without prejudice pursuant to 28 U.S.C. § 1915(d) and (e)(2)(i). It is further the RECOMMENDATION of the Magistrate Judge that costs be taxed against the plaintiff. Finally, it is

ORDERED that the parties shall file any objections to the said Recommendation on or before February 12, 2007. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation to which the party objects. Frivolous, conclusive or general objections will not be considered by the District Court. The parties are advised that this Recommendation is not a final order of the court and, therefore, it is not appealable.

Failure to file written objections to the proposed findings and recommendations in the

---

<sup>1</sup> Unquestionably, the statute of limitations is usually a matter which may be raised as an affirmative defense. The court notes, however, that in an action proceeding under § 1983, it may consider, *sua sponte*, affirmative defenses that are apparent from the face of the complaint. *Clark v. State of Ga. Pardons & Parole Bd.*, 915 F.2d 636, 640 n.2 (11<sup>th</sup> Cir. 1990); *see also Ali v. Higgs*, 892 F.2d 438 (5<sup>th</sup> Cir. 1990). "[I]f the district court sees that an affirmative defense would defeat the action, a section 1915[(e)(2)(B)(i)] dismissal is allowed." *Clark*, 915 F.2d at 640. "The expiration of the statute of limitations is an affirmative defense the existence of which warrants dismissal as frivolous." *Id.* at 640 n. 2.

Magistrate Judge's report shall bar the party from a de novo determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5<sup>th</sup> Cir. 1982). *See Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11<sup>th</sup> Cir. 1982). *See also Bonner v. City of Prichard*, 661 F.2d 1206 (11<sup>th</sup> Cir. 1981, *en banc*), adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Done this 29<sup>th</sup> day of January, 2007.

/s/Charles S. Coody  
CHARLES S. COODY  
CHIEF UNITED STATES MAGISTRATE JUDGE